

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DAWN M. HIGHLEY</b>	)	
Claimant	)	
VS.	)	
	)	
<b>OUR OWN HARDWARE</b>	)	Docket No. 193,927
Respondent	)	
AND	)	
	)	
<b>AMERICAN HARDWARE MUTUAL INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the Award entered by Administrative Law Judge Alvin E. Witwer dated May 31, 1996. The Appeals Board heard oral argument on November 19, 1996, in Kansas City, Kansas.

**APPEARANCES**

Claimant appeared by her attorney, Derek R. Chappell of Ottawa, Kansas. Respondent and its insurance carrier appeared by their attorney, H. Wayne Powers of Overland Park, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board considered the record and adopts the stipulations listed in the Award.

**ISSUES**

- (1) Whether claimant met with personal injury by accident on September 20, 1994, arising out of and in the course of her employment with respondent.
- (2) The nature and extent of claimant's disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the briefs and arguments of the parties, the Appeals Board finds that the Award entered by the Administrative Law Judge for permanent partial disability benefits based upon the parties' stipulation to a 5 percent functional impairment to the body as a whole, after taking into consideration the preexisting impairment, should be affirmed.

The Appeals Board adopts the analysis and conclusions of the Administrative Law Judge that claimant suffered personal injury by accident on the date alleged, that said accident arose out of and in the course of her employment with respondent, and that claimant's permanent partial disability award should be limited to her functional impairment rating. Claimant returned to work for respondent at an accommodated job within her restrictions. However, prior to receiving her permanent restrictions, claimant was terminated due to her excessive absenteeism. Nevertheless, from the conduct of the respondent, including the efforts respondent made to accommodate claimant's temporary restrictions, the record clearly supports a finding that respondent intended to continue to accommodate claimant's restrictions and that claimant understood this to be true. Thus, following her release to full-time work, claimant would have been earning a wage comparable to that which she was earning at the time of her injury. Accordingly, the Appeals Board adopts the Administrative Law Judge's conclusion that claimant's permanent partial disability benefits should be based upon the functional impairment rating pursuant to K.S.A. 44-510e(a) which provides in pertinent part:

"An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

The Administrative Law Judge found that claimant would have earned a comparable wage following her release to work full time at the accommodated job provided by the respondent. Such wage should be imputed to her after she was terminated from the employment because such termination was due to the claimant's failure to abide by the company's rules and procedures. Specifically, claimant was terminated for excessive absenteeism despite her having been given numerous warnings of the infractions. Although claimant attempted to justify her conduct on the basis that she left work due to symptoms from her injury, the Appeals Board finds that the accommodated job offered by

respondent was within her restrictions and, in the opinion of the treating physician, was within her ability to perform. Claimant failed to put forward a good-faith effort to perform the accommodated job. Claimant's conduct was equivalent to refusing to attempt accommodated employment. Accordingly, the public policy considerations announced by the Court of Appeals in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), are applicable to the facts in this case.

Although Foulk dealt with work disability under the former version of K.S.A. 44-510e, the Appeals Board has previously held that the Court's rationale in Foulk is applicable to injuries occurring after July 1, 1993, where a claimant "has refused employment which the claimant has the ability to perform or voluntarily removes himself from the labor market without good reason." Wollenberg v. Marley Cooling Tower Co., Docket No. 184,428 (opinion filed September 26, 1995). Accordingly, the wage she would have earned should be imputed to claimant for purposes of determining her disability. Since the accommodated job with respondent would have paid claimant a wage equal to 90% or more of that which she was earning at the time of her injury, her disability award is limited to her percentage of functional impairment.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Alvin E. Witwer dated May 31, 1996, should be, and is hereby, affirmed as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Dawn M. Highley, and against the respondent, Our Own Hardware, and its insurance carrier, American hardware Mutual Insurance Company, for an accidental injury which occurred September 20, 1994. That the claimant is, therefore, entitled to 5.71 weeks of temporary total disability compensation at the weekly rate of \$233.32, and in the sum of \$1,332.26, plus 7 weeks of temporary partial disability compensation at various rates in the sum of \$641.27. Based upon the claimant's average weekly wage of \$349.96 to January 16, 1995, and an average weekly wage of \$444.90 effective January 16, 1995, the claimant is entitled to 4.15 weeks of permanent partial disability compensation at the weekly rate of \$233.32 and in the sum of \$968.28, plus 16.60 weeks of permanent partial disability compensation at the weekly rate of \$296.61, and in the sum of \$4,923.73 for a 5% permanent partial disability, making a total award of \$7,865.54, all of which is due and owing claimant and which is ordered paid in one lump sum less any amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Derek R. Chappell, Ottawa, KS  
       H. Wayne Powers, Overland Park, KS  
       Alvin E. Witwer, Administrative Law Judge  
       Philip S. Harness, Director